

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own
motion as to the propriety of the rates and
charges set forth in the tariff filings by
Verizon – New England, Inc.,
d/b/a Verizon – Massachusetts

DTE 98-57, Phase III

**AT&T'S REPLY COMMENTS REGARDING WHY THE DEPARTMENT'S REVIEW OF VERIZON'S
PARTS OFFERING AND ELECTRONIC LOOP PROVISIONING HAS NOT BEEN PREEMPTED**

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Reply Argument

I. THE *TRIENNIAL REVIEW* DOES NOT ELIMINATE VERIZON'S RESPONSIBILITY TO MAKE ITS FACILITIES AVAILABLE, AND TO ALLOW INTERCONNECTION WITH ITS NETWORK, ON REASONABLE TERMS.

Verizon argues that the Department is completely powerless to review its PARTS service proposal, or to ensure that the related changes in Verizon's network architecture are not implemented in a manner designed by Verizon to stifle competition and deny Massachusetts consumers effective choice in wireline voice and data services. *See* "Comments of Verizon Massachusetts," dated October 2, 2003 ("Verizon's Comments"). Verizon's argument is based on the false premise that it "is neither legally obligated to offer PARTS or unbundle it." *Id.* at 2.

In fact, Verizon has a continuing obligation under Massachusetts law to make its facilities, and interconnection with its facilities, available on terms and conditions that are just, reasonable, and non-discriminatory. *See* AT&T's Initial Comments at 15. This is consistent with Verizon continuing obligation under federal law, specifically 47 U.S.C. § 271, to provide CLECs with non-discriminatory access to Verizon's loops, switching, transport, and signaling even where Verizon is not separately required by FCC rules and 47 U.S.C. § 251 to do so at TELRIC rates. *Id.*

In sum, as both AT&T and Covad demonstrated in their initial comments, the *Triennial Review Order* did nothing to change Verizon's continuing responsibility to provide CLECs with interconnection to its network on reasonable terms. Under both federal and state law, Verizon must allow CLECs access to its PARTS architecture, and allow CLECs to interconnect with that architecture, on reasonable and non-discriminatory terms and prices. On its face, Verizon's PARTS proposal appears to be inconsistent with this existing obligations. At the very least, the Department needs to continue this investigation in order to ensure that CLECs have access to the PARTS architecture on such terms.

II.....THE FCC HAS NOT “OCCUPIED THE FIELD,” SINCE CONGRESS EXPRESSLY AUTHORIZED STATE COMMISSIONS TO CONTINUE THEIR LONGSTANDING OVERSIGHT OF TELECOMMUNICATIONS SERVICE

In addition to enforcing Verizon’s existing obligations to provide wholesale access to the facilities that Verizon is deploying to packetize signals on its loops, the Department also retains full authority to consider whether to require as a matter of Massachusetts law and policy that Verizon do so at TELRIC rates. *See* AT&T’s Initial Comments at 8-10.

Verizon tries to wish away this legal fact by asserting that the FCC’s *Triennial Review Order* somehow “occupies the field” with respect to the regulation of any and all future deployment or use of telecommunications technology that packetizes information. *See Verizon Comments*, at 4. That assertion is wrong. In order for the FCC’s order or other federal requirements to preempt the field, federal regulation must be so pervasive as to leave “no room” for parallel state requirements. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375 (1985). Verizon can make no case for field preemption here, where Congress explicitly reserved a role for states in regulating local telecommunications competition within the 1996 Act and states have adopted parallel regulatory requirements pursuant to that authority. *See id.* Thus, the federal requirements discussed in this case are not so comprehensive as to eliminate the Department’s role. *See id.*

As the Supreme Judicial Court has explained, in determining whether State law has been preempted we must “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Roberts v. Southwestern Bell Mobile Systems, Inc.*, 429 Mass. 478, 486 (1999). *Roberts* holds that the Telecommunications Act of 1996 does not “occupy the field,” and thus does not preempt the imposition of additional obligations under state law, because Congress has expressly reserved to the States the power to do so. *Id.*, 429 Mass. at 487. Thus, even if the

Triennial Review Order did attempt to occupy the field, it would be in vain. *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 1901 (1986) (holding that a federal agency may “preempt state law only when and if it is acting within the scope of its congressionally delegated authority,” and “[a]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it.”).

Verizon goes on to cite *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288 (2000), for the proposition “that state regulations are preempted, even if they share a ‘common goal’ with federal law, where they differ in the *means* chosen to further that goal.” *See* Verizon’s Comments at 9. Once again, Verizon’s legal analysis is in error. The state law in issue in *Crosby* encroached on the national government’s traditionally exclusive authority to regulate and conduct the foreign affairs of the United States. *See id.* at 380-81, 2298. No such exclusive federal authority would be threatened by Department action here. As AT&T established in its initial comments, the 1996 Act was purposefully designed to create a parallel regulatory scheme between federal and state governments. *See* AT&T’s Initial Comments at 8.

Since the States have long had authority to regulate telecommunications services, and to supplement federal regulation by the FCC with additional requirements under state law, *Crosby* is simply irrelevant here. *See, e.g., Green v. Fund Asset Management, L.P.*, 245 F.3d 214, 231 (3rd Cir. 2000) (holding that investors’ claims under Massachusetts law were not preempted by federal Investment Company Act, and distinguishing *Crosby* on the ground that it concerned foreign policy and thus did not involve the presumption against preemption in areas traditionally involving independent state regulation); *New York v. Microsoft Corp.*, 209 F.Supp.2d 132, 154 (D.D.C. 2002) (after remand from D.C. Circuit, holding that states have independent authority to sue Microsoft for antitrust violations, and distinguishing *Crosby* on ground that it was irrelevant

in light of long history of state power to impose additional antitrust requirements under state law that go beyond what has been ordered under federal law).

The Massachusetts statute challenged in *Crosby* imposed economic restrictions that were affirmatively prohibited by a parallel federal statute. *See* 530 U.S. at 378, 120 S.Ct. at 2297. Thus, the state statute in *Crosby* represented a sharp divergence from affirmative federal requirements. *See id.* Further investigation of PARTS by the Department would not involve this type of sharp divergence from federal law. Though the *Triennial Review Order* did not require the unbundling of packetized loop functionality at TELRIC rates as a matter of federal law, it does not impose an affirmative prohibition upon the unbundling of the PARTS architecture at the state level. Furthermore, Department action to promote reasonable access to PARTS at forward-looking cost would be consistent with the 1996 Act's requirement, reemphasized in the *Triennial Review Order*, that Verizon allow interconnection with its network on reasonable terms. *See* AT&T's Initial Comments at 15.

III. THE DEPARTMENT RETAINS BROAD AUTHORITY TO REGULATE VERIZON'S NETWORK AND SERVICES, INCLUDING TO REQUIRE THAT VERIZON SUPPORT AND FACILITATE ELECTRONIC LOOP PROVISIONING.

A. Verizon's Assertion That the Department Has No Power to Require Verizon To Make Any Modifications to its Network or Operations Is Incorrect.

Verizon argues that the Department has no authority to require that Verizon make modifications to its network, or even that Verizon change the manner in which it implements planned changes to its network such as its rollout of its PARTS architecture. *See* Verizon's Comments at 10, fn. 11 (asserting that "Verizon MA cannot lawfully be required to provide CLECs with access to a 'superior, as-yet unbuilt' network"). If that were true, then the Department would be powerless to impose or enforce service quality standards that required any improvements to Verizon's network. Fortunately, Verizon's claim is empty hyperbole, and is contradicted by clear Massachusetts law. On this point, Verizon relies solely on citations to

decisions by the United States Court of Appeals for the Eighth Circuit construing the FCC's authority under federal law, and incorrectly ignores the Department's independent authority under Massachusetts law.

The Massachusetts Legislature delegated to the Department explicit statutory authority to determine whether Verizon's "equipment, appliances or service ... are unjust, unreasonable, unsafe, improper or inadequate;" if so the Department may specify "the equipment, appliances and services" that Verizon must thereafter use to provide service of a type and quality that the Department finds to be adequate. G.L. c. 159, § 16. This statute makes clear that the Department has the authority to investigate Verizon's network and practices, and to require that improvements be made to both. *See also, e.g., D.T.E. 98-85*, dated December 18, 1998 (ordering Bell Atlantic to modify its network and systems in order to support IntraLATA Presubscription).

If Verizon chooses to rollout out a new network design that is found to be "inadequate," the Department may require Verizon to install different "equipment" or "appliances," or to do so in a different manner so as to support reasonably adequate functionality. G.L. c. 159, § 16.

B. The FCC's Limited Treatment of Electronic Loop Provisioning in the *Triennial Review Order* Does Not Prohibit Massachusetts-Specific Exploration of ELP in this proceeding.

Verizon's contention that the *Triennial Review Order* prevents the Department from moving forward with its exploration of Electronic Loop Provisioning (ELP) is also without merit. *Cf.* Verizon's Comments, at 9-10. While the FCC did not require that ELP be put in place nationwide at this time, it did not prohibit state commissions from investigating it. Even on a national basis, the *Triennial Review Order* states that reopening the issue of ELP may be necessary if and when the hot cut process proves insufficient to handle large-volume UNE-L transfers. *See TRO* ¶ 491.

Moreover, the FCC's reasoning in declining to require ELP nationwide is inapplicable in Massachusetts. Verizon quotes language in the *TRO* stating that, on a nationwide basis, ELP "would entail a fundamental change in the manner in which local switches are provided and would require dramatic and extensive alterations to the overall architecture of very incumbent LEC network." Verizon's Comments at 10, quoting *TRO* ¶ 491. In Massachusetts, however, Verizon is already and voluntarily implementing many of the network changes that will be needed to make ELP a reality. Those are the very changes that give rise to Verizon's PARTS service proposal. AT&T has urged the Department to determine whether the further, incremental changes needed to permit Verizon's voluntary new network architecture compatible with ELP are sensible. Since Verizon is already planning to add packet technology to its fiber-fed loops in Massachusetts, the incremental cost of adding packetized voice capability to Verizon's PARTS rollout will be far, far less than the nationwide costs alluded to by the FCC.

Seeing as Verizon has already begun these alterations, there is no reason for the Department to shy away from investigating whether it can ensure that these network modifications are completed in a manner that will promote, rather than retard, local telecommunications communication. As AT&T set forth in its initial comments, Department action now is critical to guarantee that Verizon does not adopt a network architecture that will make the evolution to a packetized voice and data network more difficult. *See* AT&T's Initial Comments at 6.

Conclusion.

For the reasons stated above and in AT&T's initial comments, further Department investigation of Verizon's PARTS offering is not preempted by the FCC's *Triennial Review Order*. AT&T respectfully urges the Department to continue its evidentiary proceedings concerning PARTS and Electronic Loop Provisioning.

Respectfully submitted,

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